No. 88-240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GAF CORPORATION,

Petitioner,

—v.—

ROSEMARIE ERICH, CONCEPCION REIDER, and ELIZABETH ZONDLER, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

REPLY BRIEF

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In their brief in opposition to the petition herein, respondents assert that the fiduciary standard of review under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, is not applicable to the determination of petitioner ("GAF") under the GAF Vacation Policy at issue for two reasons: (1) GAF initially "supported the validity of the DOL regulation"[1] that purports to preclude the application of ERISA to unfunded vacation pay plans like the GAF Vacation Policy, Brief in Opposition 4; and (2) GAF had not met any of the reporting and disclosure requirements imposed by ERISA

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1 29 C.F.R. § 2501.3-1(b)(3).

upon the administrator of an employee welfare benefit plan. Brief in Opposition 9. Both contentions fail.

First, the position of GAF in the trial court as to the force and effect of the DOL regulation was taken in opposition to respondents' claim that GAF had violated ERISA's reporting and disclosure requirements. GAF's position was that it had reasonably relied upon the DOL regulation in not complying with those requirements.[2] At the same time,[3] GAF agreed that, if ERISA applied, it required preemption of state law, on which respondents' original complaint was premised. Following the trial court's holding that ERISA does apply and preempt state law in the action (App. 17a-20a), GAF urged preemption in the trial court, the Appellate Division, and the Supreme Court of New Jersey. On the other hand, the preemption that respondents now contest was conceded by them in the state courts.[4]

Although respondents raised their second contention herein below,[5] the Supreme Court of New Jersey disregarded it. Respondents' argument rests upon *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985). *Blau* has been distinguished or limited in its purported enunciation of two different standards of review, one for administrators who comply with the ERISA reporting and disclosure rules and another for plan administrators who do not. *See, e.g., Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1149 (4th Cir. 1985), *summarily aff'd sub nom. Brooks v. Burlington Industries, Inc.*, 477 U.S. 901, *and cert. denied*, 477 U.S. 903 (1986). Even the Ninth Circuit itself has distinguished *Blau*. *See Jung v. FMC Corp.*, 755 F.2d 708 (9th Cir. 1985).

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2 The Certification referred to at Brief in Opposition 4, n.4 was submitted for precisely that purpose.

3 Brief of Defendant, GAF, in the Superior Court of New Jersey, Law Division, pp. 2-5 (Jan. 10, 1985).

4 Under the circumstances, respondents' reliance upon *Illinois v. Gates*, 462 U.S. 213, *reh'g denied*, 463 U.S. 1237 (1983), is inapposite.

5 Brief of Plaintiffs-Appellants-Cross-Respondents (respondents herein) in the Superior Court of New Jersey, Appellate Division, pp. 42-45.

Moreover, the *Blau* court itself clearly limited its reasoning to instances "when ERISA's provisions have been flouted in . . . a wholesale and flagrant manner." 748 F.2d at 1353. There certainly is no basis for such a conclusion in this case.[6] As respondents themselves note,[7] any noncompliance by GAF with the reporting and disclosure requirements of ERISA existed because of its reasonable belief that the GAF Vacation Policy did not constitute an employee welfare benefit plan within the meaning of ERISA. That would preclude any application of the *Blau* reasoning (whatever its validity) to this case.

Certainly, such pre-litigation reliance does not preclude GAF from contending, as it does herein, that the regulation does not authoritatively interpret, but rather contravenes, the statute. Nor does it prevent GAF from arguing that ERISA does apply to unfunded vacation pay plans such as the GAF Vacation Policy and, therefore, preempts state law in its application to such plans. *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986); *Holland v. Burlington Industries, Inc.*, *supra*. Thus, the present case is even more compelling than *Firestone Tire & Rubber Co. v. Bruch*, No. 87-1054, for a determination of the standard of review of employee welfare plan determinations under ERISA. Indeed, the dilemma and uncertainty with which GAF and many other employers were, and are, faced by the conflict between the clear language of ERISA and the DOL regulation underscores the need for this Court's review.

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6 Unlike the employer-administrator in *Blau*, who had affirmatively kept the very existence of the plan secret, the GAF Vacation Policy was summarized in a written document circulated by GAF among employees of its Wayne, New Jersey, facility.

7 Brief in Opposition 9 and n.9.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, GAF's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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